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# The origins of the Scottish *forum non conveniens* doctrine

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Scotland is widely regarded as the birthplace of *forum non conveniens*. The doctrine is perhaps Scots law's most important private-international-law export, helping to shape the development of similar principles across the common law world. However, notwithstanding the doctrine's significance and long-running history, relatively little is known about its origins in Scotland. The principal intention of the article is to trace the Scots doctrine's genesis. In this respect, its chief contention is that the discretionary staying-of-proceedings practice – resembling that at the heart of the modern-day *forum non conveniens* doctrine – is not actually as deep-seated as it has been widely believed. Rather, the practice first manifested itself in Scotland in *M'Morine v Cowie* in 1845, following an apparent misunderstanding of earlier case law concerning the administration of foreign estates and partnerships.

**Keywords:** Private International law, jurisdiction, Scottish *forum non conveniens* doctrine

## A. Introduction

Just over nine decades ago, in an appeal from the Court of Session, the House of Lords formally recognised the Scottish *forum non conveniens* doctrine in *Société de Gaz de Paris v Société Anonyme de Navigation "Les Armateurs Français"*.<sup>1</sup> This landmark ruling stamped a seal of approval on the practice of discretionary staying of proceedings which the Scots court had developed in a long list of judicial authorities, dating back to (at least) the 1860s.<sup>2</sup> Based

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<sup>1</sup> [1926] SC 13.

<sup>2</sup> See, eg, *Longworth v Hope* (1865) 3 M 1049, *Clements v Macaulay* (1866) 4 M 583, *Lynch v Stewart* (1871) 9 M 860, *Macadam v Macadam* (1873) 11 Sess Cas 860, *Martin v Stopford-Blair's Executors* (1879) 7 R 329, *Williamson v North-Eastern Railway Company* (1884) 11 R 596, *Sim v Robinow* (1892) 19 R 665, *David Fairweather and Others (Adamson's Trustees) v Mactagart* (1893) 1 SLT 41, *Hine v MacDowall* (1897) 5 SLT 12, *M'Lachlin v London and North-Western Railway Co* (1899) 7 SLT 244, *Powell v Mackenzie & Co* (1900) 8 SLT 182, *Lane v Foulds* (1903) 11 SLT 118, *Gemmell v Emery* (1905) 13 SLT 490, *Anderson, Tulloch & Co v JC & J Field* 1910 1 SLT 401, *James Howden & Co Ltd v Powell Duffryn Steam Coal Co Ltd* 1912 1 SLT 114, *Rothfield v Cohen* (1919) 1 SLT 138 and *French v Hohback* (1921) 2 SLT 53.

on this practice, and in the context of private-international-law disputes, the court in Scotland has a discretion to relinquish its (otherwise) soundly-constituted jurisdiction if persuaded that such a step would be “in the interests of the parties, and for the ends of justice”.

As noted by the editors of *Anton’s Private International Law*, the pre-eminent treatise on Scottish conflict of laws, Scotland was where the *forum non conveniens* doctrine was “invented”.<sup>3</sup> Moreover, *forum non conveniens* is arguably Scotland’s most significant legal export in the field of private international law, influencing the development of similar doctrines across the common law world.<sup>4</sup> In relation to England, for example, the modern-day *locus classicus* on the discretionary staying-of-proceedings practice, as articulated in Lord Goff of Chieveley’s seminal speech in *Spiliada Maritime Corporation v Cansulex Ltd*,<sup>5</sup> was partly inspired by leading Scottish judgments, particularly Lord Kinneir’s influential *dictum* in *Sim v Robinow*.<sup>6</sup> For these reasons, even though the Scottish doctrine has been superseded by the *Spiliada* test,<sup>7</sup> its significance cannot be downplayed.

In historical terms, it is relatively straightforward to identify the doctrine’s path of evolution in the six decades prior to the House of Lords’ ruling in the *Les Armateurs Français* case. The same claim, though, cannot be made in relation to its earlier origins. In fact, the doctrine’s genesis has been described as being “obscure”.<sup>8</sup> Nonetheless, the predominant view, evidenced within the academic commentary in this field, states that the Scottish *forum non conveniens* doctrine can be traced to the plea of *forum non competens*, which had been applied in Scotland as long ago as in the early seventeenth century. In this context, for instance, Professor McLachlan QC has observed that “the Scots had, at least

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<sup>3</sup> PB Beaumont and PE McEleavy, *Anton’s Private International Law* (Edinburgh, W Green, 3<sup>rd</sup> edn, 2011), [8.405] (citation omitted).

<sup>4</sup> *Ibid.*

<sup>5</sup> [1987] AC 460.

<sup>6</sup> (1892) 19 R 665, 668.

<sup>7</sup> See, eg, *Sokha v Secretary of State for the Home Department* [1992] SLT 1049, *PTKF Kontinent v VMPTO Progress* [1994] SLT 235 and *Royal Bank of Scotland v Davidson* [2010] SLT 92.

<sup>8</sup> EL Barrett, Jr, “The Doctrine of *Forum Non Conveniens*” (1947) 35 *California Law Review* 380, 386.

since 1610, begun to develop a doctrine of *forum non competens*, a predecessor to *forum non conveniens*”.<sup>9</sup> In other words, according to the orthodox understanding of the doctrine’s historical genesis, the *forum non conveniens* doctrine is the *conceptual* descendent of the earlier plea of *forum non competens*.

The main purpose of the forthcoming discussion, which is presented in three main parts, is to help to enrich our understanding of the doctrine’s more-distant origins in its birthplace. It begins, in Part B, with an overview of the developments in Scotland from the mid-1860s until the House of Lords’ endorsement of the doctrine in the *Les Armateurs Français* case in 1925. Part C, then, examines the prevailing view on the earlier origins of the Scottish doctrine and, following a detailed analysis of the relevant case law in the seventeenth and eighteenth centuries, finds it to be unpersuasive. Finally, Part D advances an alternative hypothesis on the earlier starting-point for the Scottish *forum non conveniens* doctrine. In this regard, the article’s principal contention is that the discretionary staying-of-proceedings practice – resembling that at the heart of the modern-day *forum non conveniens* doctrine – is, in fact, far less deep-rooted than it might have been expected. Instead, the practice first manifested itself in Scotland in *M’Morine v Cowie* in 1845, following an apparent misunderstanding of earlier case law concerning the administration of foreign estates and partnerships.

## **B. The Scottish *forum non conveniens* doctrine’s latter-day evolution: mid-1860s-1925**

In order to understand the developments which led ultimately to the House of Lords’ endorsement of the *forum non conveniens* doctrine, the best starting point is actually the *Les Armateurs Français* case itself. *Les Armateurs Français* concerned an action by the pursuers,

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<sup>9</sup> C McLachlan QC, *Lis Pendens in International Litigation* (Leiden/Boston, Martinus Nijhoff Publishers, 2009), 57. See also RA Brand and SR Jablonski, *Forum Non Conveniens: History, Global Practice, and Future under the Hague Convention on Choice of Court Agreements* (New York, Oxford University Press, 2007), 7; C M, Jr, “The Doctrine of Forum Non Conveniens” (1948) 34 *Virginia Law Review* 811, 812; and, Barrett, Jr, *supra* n 8, 387.

a British insurance company,<sup>10</sup> against the defenders, a French company, for damages for the loss of cargo shipped by the defenders. The Scottish court's jurisdiction over the dispute had been based on the arrestment of one of the defenders' vessels within Scottish waters. In return, the defenders, relying on the *forum non conveniens* doctrine, sought a stay of proceedings. They submitted that France was the forum most closely connected to the dispute and, hence, it was in the interests of the parties, and for the ends of justice, for the Scots court to relinquish its jurisdiction. In particular, the defenders pointed to the location of the witnesses and evidence in France and also claimed that French law governed the dispute. At first instance, the Sheriff Court repelled the defenders' submissions. However, following the defenders' appeal, the Court of Session reversed the Sheriff Court's ruling.

On the pursuer's appeal to the House of Lords, the key question for consideration was whether the *forum non conveniens* application had been rightly sustained by the Court of Session. On the facts of the case, the House of Lords upheld the Court of Session's decision to stay the Scottish proceedings. Indeed, the court found that, given the dispute's overwhelming connection with France, it was "difficult to conceive of a stronger case for the application of the doctrine of *forum non conveniens*".<sup>11</sup> In applying (and, in turn, formally accepting) the practice of discretionary staying of proceedings under the *forum non conveniens* doctrine in Scotland, two earlier Court of Session authorities featured prominently in the House of Lords' reasoning: *Clements v Macaulay*, in 1866,<sup>12</sup> and *Sim v Robinow*, in 1892.<sup>13</sup> As the discussion in this section illustrates, *Clements* and *Sim*, and the other cases decided in the period between these two authorities,<sup>14</sup> had set out (and elaborated on) the basic framework for the court's approach to discretionary non-exercise of jurisdiction in

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<sup>10</sup> The case report does not specify whether English or Scottish. The insurers had become involved in the proceedings after compensating the original pursuers, a French gas company, for the value of the lost cargo.

<sup>11</sup> *Les Armateurs Français*, *supra* n 1, 17-18 (Lord Cave LC).

<sup>12</sup> (1866) 4 M 583.

<sup>13</sup> (1892) 19 R 665.

<sup>14</sup> *Eg, Lynch*, *supra* n 2, *Macadam*, *supra* n 2, *Martin*, *supra* n 2, and *Williamson*, *supra* n 2.

Scotland, which finally received the House of Lords' approval in the *Les Armateurs Français* case. Therefore, much can be learnt from an assessment of this stream of precedent about the latter-day evolution of the doctrine in Scotland.

A close analysis of these decisions indicates that there were three main phases in the Scottish *forum non conveniens* doctrine's evolution, prior to its receiving the House of Lords' recognition in 1925. The first phase concerned the earliest occasions, certainly in the run up to the decision in the *Les Armateurs Français* case, in which the Scots court granted a discretionary stay of its proceedings on the basis of (what would now be regarded as) the *forum non conveniens* doctrine.<sup>15</sup> In this context, the decision in *Clements* is particularly worthy of consideration. The case arose from a contractual dispute between the pursuer, C, a Texan domiciliary, and the defender, M, a resident of New Orleans. The Scottish court had assumed jurisdiction over M through the arrestment of his assets in Scotland.<sup>16</sup> In response, M applied to stay the action, based on what was then known as the *forum non competens* plea. He contended that the facts of the case – especially, the *locus contractus*, the object of C's action and all the accounts and documents which were of relevance to it – pointed to Texas as the more convenient forum for resolving the dispute.<sup>17</sup> The Court of Session, however, rejected M's application for a stay. In outlining the plea, Lord Justice-Clerk Inglis stated that staying the proceedings in Scotland under *forum non competens* depended on whether “for the interests of all the parties, and for the ends of justice, the cause may more suitably be tried elsewhere”.<sup>18</sup> Likewise, Lord Cowan noted that the *forum non competens* plea would be admitted only if another court was deemed to be “more convenient and

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<sup>15</sup> Eg, *Longworth*, *supra* n 2, *Clements*, *supra* n 2 and *Lynch*, *supra* n 2.

<sup>16</sup> This head of jurisdiction, which is also known as *jurisdictionis fundandæ causa*, provides the Scottish court with a basis for entertaining a case against a defender who has assets in Scotland but is not domiciled there.

<sup>17</sup> *Clements* (1866) 4 M. 583, 590.

<sup>18</sup> *Ibid*, 592.

preferable for securing the ends of justice”.<sup>19</sup> On the facts of the case, the court held that M had not been able to show that the Texan court would have jurisdiction over the dispute and, hence, repelled his application.<sup>20</sup>

The court’s approach in *Clements* to discretionary staying of proceedings, under the *forum non competens* plea, was identical to that employed in an earlier Court of Session decision in *Longworth v Hope*.<sup>21</sup> *Longworth* was an 1865 defamation case, involving English litigants, in which the Scottish court had repelled the defenders’ *forum non competens* plea, stating that a case for staying the Scottish proceedings – in the interests of parties, and for the ends of justice – had not been made.

Doctrinally, the Scottish court’s characterisation of its discretionary staying-of-proceedings practice under the label *forum non competens*, during the first phase of the developments in cases like *Longworth* and *Clements*, was suspect. The wording of the plea had suggested that it was the court’s *competence* which was under scrutiny. In reality, though, the defenders were questioning the *appropriateness* of having the proceedings in Scotland. The following passage in Lord Deas’s judgment in the *Longworth* case shows that the court was, in fact, aware of this shortcoming

“the [*forum non competens*] plea is really not that the one forum is incompetent, but that the other forum ought to be preferred. Where there are two competent forums, the question [which the plea is concerned with] is, do the ends of justice require that an action brought in the one should be sisted in order that proceedings may be taken or go on in the other?”<sup>22</sup>

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<sup>19</sup> *Ibid*, 594.

<sup>20</sup> *Ibid*, 595.

<sup>21</sup> (1865) 3 M 1049.

<sup>22</sup> *Ibid*, 1058.

In response to this problem, the latter-day evolution of the Scottish doctrine entered its second phase in the 1873 case of *Macadam v Macadam*,<sup>23</sup> in which the Scottish court altered the terminology used for the plea. In this case, the facts of which are of little relevance to the present discussion, the defender had not actually applied to stay the proceedings in Scotland; rather, she had sought to challenge the *existence* of the Scottish court's jurisdiction. Nevertheless, at first instance, the Lord Ordinary stated that the question in the case "was not [so] much one of jurisdiction as of *forum competens* or *conveniens*".<sup>24</sup> On the defender's appeal to the Court of Session, Lord Cowan, too, stated that the question in the case was one of *forum conveniens* as opposed to jurisdiction.<sup>25</sup> The neo-Latin phrase *forum non conveniens* was, therefore, deemed to be a more accurate formulation for describing the nature of the plea. Indeed, the new label replaced the old one and began to be used more widely towards the end of the nineteenth century.<sup>26</sup>

The third (and final) phase in the development of *forum non conveniens*, before the House of Lords' endorsement of it in *Les Armateurs Français*, came in 1892 in *Sim*. In this case, the pursuer, S, an Englishman, commenced proceedings against the defender, R, a Scotsman, while he was present in Scotland. S accused R of having wrongfully wound up a joint venture in which they had both been involved. They had entered into this venture, which concerned South African mining shares, while in South Africa. The main question which the Court of Session had to decide on was whether the proceedings in Scotland should be stayed under the *forum non conveniens* doctrine. R's chief contention, in respect of this application, was that South Africa was where he should be sued, in the interests of both parties and for the ends of justice. In particular, he argued that his stay in Scotland was temporary and that he

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<sup>23</sup> (1873) 11 Sess Cas 860.

<sup>24</sup> *Ibid*, 861.

<sup>25</sup> *Ibid*, 862.

<sup>26</sup> Eg, *Williamson*, *supra* n 2.



had always intended to return to South Africa. Furthermore, he contended that all the documents relevant to the dispute were in South Africa.

The Court of Session, however, rejected R's *forum non conveniens* application. Lord Kinnear stated that staying proceedings on the basis of *forum non conveniens* was not dependent upon a mere balance of (in)convenience and that something more was needed in order to sustain a plea of *forum non conveniens*.<sup>27</sup> He considered that R's claim – namely, that the dispute between the parties would be more speedily and conveniently tried in South Africa – was simply a matter of the balance of (in)convenience between an inquiry in Scotland and South Africa.<sup>28</sup> Hence, Lord Kinnear concluded, relying especially on the judgment in *Clements*, that the *forum non conveniens* plea “can never be sustained unless the Court is satisfied that there is some other tribunal, having competent jurisdiction, in which the case may be tried more suitably for the interests of all the parties and for the ends of justice”.<sup>29</sup>

In many ways, Lord Kinnear's *dictum* in *Sim* rounded up almost 30 years' of developments. By reiterating the developments which had preceded it, *Sim* effectively signified the final step in the refinement of the *forum non conveniens* doctrine in Scotland. The approach in this case went on to form the basis for decision-making in a number of subsequent Scots cases from the 1890s to the mid-1920s.<sup>30</sup> The House of Lords' ruling in the *Les Armateurs Français* case simply put a seal of approval on the Scots law's practice of discretionary staying of proceedings.

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<sup>27</sup> (1892) 19 R 665, 668.

<sup>28</sup> *Ibid.*

<sup>29</sup> *Ibid.*

<sup>30</sup> Eg, *Hine*, *supra* n 2, *M'Lachlin*, *supra* n 2, *Powell*, *supra* n 2, *Gemmell*, *supra* n 2, *Anderson*, *supra* n 2, *Rothfield*, *supra* n 2 and *French*, *supra* n 2.

### C. Did the Scottish *forum non conveniens* doctrine originate from the *forum non competens* plea?

While these historical developments, during the latter stage of the doctrine's evolution in Scotland, have been relatively easy to map out, much less is known about the doctrine's more-distant past. In particular, the basis on which the Scottish court, in cases like *Longworth* and *Clements*, embarked on developing a discretionary staying-of-proceedings practice is not readily detectable.

As indicated at the start of this discussion, the dominant view, held by a number of academic commentators across the common law world,<sup>31</sup> has stated that *forum non conveniens* in Scotland is traceable to the earlier plea of *forum non competens*, which the Scottish court had entertained (at least) as long ago as in the 1610 case of *Vernor v Elvies*.<sup>32</sup> For instance, the authors of *Forum Non Conveniens: History, Global Practice, and Future under the Hague Convention on Choice of Court Agreements*, have stated that the Scottish court had employed the term *forum non competens* as the basis for assuming “the authority, in the “interests of justice”, to decline to hear a case even when jurisdiction was otherwise proper”.<sup>33</sup> The purpose of this part of the article is to assess the persuasiveness (or otherwise) of the orthodox account of the doctrine's earlier origins in Scotland. The main issue for consideration is, therefore, whether the *forum non competens* plea in those earlier cases was resorted to in the same context as that underpinning the case law discussed in Part II – namely, concerning the Scottish court's *exercise* of its otherwise properly-founded jurisdiction.

At first blush, it might be tempting to accept the orthodox position. After all, in decisions such as *Longworth* and *Clements*, and prior to its ruling *Macadam*, the Scottish

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<sup>31</sup> McLachlan QC, *supra* n 9, 57, Brand & Jablonski, *supra* n 9, 7, M, Jr, *supra* n 9, 812 and Barrett, Jr, *supra* n 8, 387.

<sup>32</sup> (1610) 6 Dict of Dec 4788.

<sup>33</sup> Brand & Jablonski, *supra* n 9, 7.

court had certainly applied the label *forum non competens* when describing its discretionary staying-of-proceedings practice. However, as the discussion in this part seeks to illustrate, the accepted view, on the remoter origins of the *forum non conveniens* doctrine in Scotland, is open to question. An examination of the application of the *forum non competens* plea in *Vernor v Elvies* – and, indeed, other case law on the application of the *forum non competens* plea in that era more generally – highlights that the plea was, in fact, concerned with the *existence* (rather than the *exercise* of) jurisdiction in Scotland. As such, it is argued that there is no *conceptual* connection between the application of the plea in the 1860s and its use in the seventeenth and eighteenth centuries. To put it another way, though, undeniably, the two were *linguistically* linked, the *forum non competens* plea was not the *forum non conveniens* doctrine’s *conceptual* ancestor.

### **1. The early application of the *forum non competens* plea**

At this juncture, it is worth considering the body of judicial pronouncements on the earlier application of the *forum non competens* plea. In this context, it is especially helpful to begin the analysis by examining the 1610 ruling of *Vernor v Elvies*. As indicated earlier, this decision has been regarded, by the proponents of the predominant view on the *forum non conveniens* doctrine’s earlier origins, as one of the first instances in which the Scottish court began to develop its practice of discretionary staying of proceedings.<sup>34</sup> The case concerned a dispute between two Englishmen, who were not present in Scotland *amino remanendi* (ie, with the intention to stay), in relation to a debt that had accrued outside of Scotland. The court stated that, on the facts of the case, “the Lords will not find themselves Judges”, stating that it would only have heard the case had the debt been due in Scotland.<sup>35</sup>

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<sup>34</sup> Eg, McLachlan QC, *supra* n 9, 57.

<sup>35</sup> *Vernor*, *supra* n 32, 4788. See also *Baron of Brughton v Kincaid* (1629) 6 Dict of Dec 4788, *Landes v Dick* (1630) 6 Dict of Dec 4789, *Walker v Brown* (1674) 6 Dict of Dec 4790, *Spottiswood v Morison* (1701) 6 Dict of

It is, of course, far from straightforward to form a conclusive interpretation of the decision in *Vernor*. The case report does not go beyond a few lines. What is more, the language used in the judgment is rather imprecise, archaic and generally ambiguous. Be that as it may, it is possible to see that there is nothing in the ruling which suggests that *Vernor* concerned a defender's application to the Scottish court to stay its otherwise validly-established jurisdiction on a discretionary basis. Rather, *Vernor* appears to be a case in which the defender was challenging outright the Scottish court's power to entertain the case. In other words, the plea was employed to challenge the *existence* of jurisdiction in Scotland (not its *exercise*). As such, it is argued that the *forum non competens* plea in *Vernor* was not applied in a manner which resembles the application of the modern-day *forum non conveniens* doctrine.<sup>36</sup>

This reading of the application of the *forum non competens* plea is not merely confined to the decision in *Vernor*. Indeed, support for it can also be found in the wider strand of *forum (non) competens* cases in the seventeenth and eighteenth centuries. An illustrative example, in this respect, is the decision in the 1639 case of *Douglas v Cunningham*.<sup>37</sup> This case arose from a dispute between Scottish litigants concerning the payment of money in relation to an English bond. The defenders protested that the Scottish court was not *forum competens*. To substantiate their contention, the defenders pointed out, *inter alia*, that they had been residing in England *amino remanendi* for nearly a quarter of a century. The Scottish court, however, repelled the defenders' submission, stating that it was *forum competens ratione rei sitæ et contractus*: "the bond was made betwixt Scotsmen, and

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Dec 4790, *Thomas and Procurator-Fiscal of Dumblane v Wright* (1708) 6 Dict of Dec 4791, *Lees v Parlan* (1709) 6 Dict of Dec 4791, *The Barbers of Edinburgh v Wilson and Blair* (1743) 6 Dict of Dec 4793 and *Rebecca Dodds v Westcombe* (1745) 6 Dict of Dec 4793.

<sup>36</sup> See also A Nuyts, *L'exception de forum non conveniens* (Brussels/Paris, Bruylant LGDJ, 2003), 89-90.

<sup>37</sup> (1639) 6 Dict of Dec 4816.

to have execution for Scots goods lying in Scotland”.<sup>38</sup> In other words, the fact that the subject matter of the dispute was in Scotland was deemed to be sufficient to render the Scottish court *forum competens* and, thereby, empowered to entertain the claim against the defenders. Yet again, and like the judgment in the *Vernor* case, there is no evidence in the case report to suggest that the defenders were seeking to resort to the Scots court’s discretion in obtaining a stay of proceedings. Conversely, it seems clear that the defenders employed the plea to challenge the Scots court’s overall competence to entertain the dispute.<sup>39</sup>

The *forum non competens* plea was applied in a similar fashion in *Anderson v Hodgson and Ormiston*.<sup>40</sup> This 1747 case arose from a dispute in the context of a debt owed by the pursuer, A, to the English defenders, H and O. Prior to that litigation, and to prevent A from potentially dissipating his assets, H and O had obtained (what in modern terms could be classified as) a freezing injunction over A’s assets in Scotland. A commenced the current proceedings to challenge the injunction. In response, H and O contended that the Scottish court was not *forum competens* and, hence, the summons against them should be set aside. The defenders raised the *forum non competens* plea to challenge their amenability to the court’s jurisdiction. There is no evidence in the case report to suggest that, at any stage, they sought to obtain a discretionary stay of proceedings.<sup>41</sup> The Scottish court repelled the defenders’ submission and ruled that because one of the defenders, O, had been Scottish born, and the debt in question had its basis in Scotland, it was *forum competens ratione originis* (ie, by reason of the defender’s place of birth).<sup>42</sup>

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<sup>38</sup> *Ibid*, 4817.

<sup>39</sup> See also *Galbreath v Cuninghame* (1626) 6 Dict of Dec 4813.

<sup>40</sup> (1747) 6 Dict of Dec 4779.

<sup>41</sup> See also Nuyts, *supra* n 36, 91.

<sup>42</sup> *Anderson*, *supra* n 40, 4780. See similarly *Robert Hog Merchant in Campreve v Smart Tenant, Merchant Campreve* (1760) 6 Dict of Dec 4780 and *Dame Elizabeth Brunsdone v Sir Thomas Wallace* (1789) 6 Dict of Dec 7484.

The claim that the *forum (non) competens* plea was applied in the seventeenth and eighteenth centuries in the context of questions concerning the *existence* (as opposed to the *exercise*) of jurisdiction is further reinforced by the accounts offered in a number of leading textbooks on private international law in Scotland. For instance, as highlighted by Anton, in the first edition of *Private International Law* in 1967, cases which would now be deemed as concerning the existence of jurisdiction in a cross-border private-law dispute in Scotland were, in the seventeenth and eighteenth centuries, categorised under two separate streams of precedent: “*forum competens*” and “jurisdiction”.<sup>43</sup> In making this statement, Anton drew on the body of case law documented in Morrison’s *Dictionary of Decisions of the Court of Session from its Institution to the Separation of the Court into two Divisions* (‘the *Dictionary*’). In the *Dictionary*, those cases which had at their heart the issue of whether the Scots court could summon a defender before it had been classified under the label “*forum competens*”. Those cases, however, which concerned the question whether the action was of a type which the court could entertain were set out in the section entitled “jurisdiction”.<sup>44</sup> More recently, this traditional classification was abandoned and the term jurisdiction began to be used for all cases which concerned the court’s power to hear cross-border private-law disputes.<sup>45</sup>

This account, it is argued, bolsters the contention that the *forum (non) competens* plea was, in fact, not employed as a means of obtaining a discretionary stay of proceedings. Instead, defenders resorted to it to question the *existence* of the Scottish court’s jurisdiction. Accordingly, it is argued that the orthodox view which regards the *forum non competens* plea, as applied in the seventeenth- and eighteenth-century cases, to be the ancestor of the *forum non conveniens* doctrine is unpersuasive. The Court of Session’s use of the label *forum non*

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<sup>43</sup> AE Anton, *Private International Law* (Edinburgh, W Green & Son, 1967), 90 (fn 2).

<sup>44</sup> *Ibid.*

<sup>45</sup> G Duncan and DO Dykes, *The Principles of Civil Jurisdiction as Applied in the Law of Scotland* (Edinburgh, William Green & Sons, 1911), 6.

*competens*, in deciding whether to exercise jurisdiction in cases like *Longworth* and *Clements* in the 1860s, suggests that while there is undoubtedly a *linguistic* link between the plea and *forum non conveniens*, the two practices are not *conceptually* alike. The *forum non competens* plea dealt with the *existence* of jurisdiction; the *forum non conveniens* doctrine relates to the court's *exercise* of its otherwise soundly-constituted jurisdiction.

## **2. The Scottish jurisdiction rules prior to the eighteenth century**

What is more, an overview of the Scottish jurisdiction rules in the period before the eighteenth century indicates that there was hardly any scope for the development in Scotland of a principle similar to *forum non conveniens* – which would enable the court to stay its proceedings on a discretionary basis. Historically, and generally speaking, the main grounds for the Scottish courts' assumption of jurisdiction in *in personam* cases were twofold.<sup>46</sup> The first empowered the court to assume jurisdiction where the defender was resident in Scotland (the so-called “jurisdiction *ratione domicilii*”). The second basis afforded jurisdiction to the court in those instances in which the cause of action had arisen in Scotland, though the defender had been present therein (generally known as “jurisdiction *ratione rei gestæ*”).<sup>47</sup>

In many ways, these rules of jurisdiction were very similar to (and, indeed, inspired by) those in civil law systems. As a result, a stronger degree of connection, than that which would trigger jurisdiction under the English common law rules, was needed before the court in Scotland would entertain a case. An assessment of the contours of jurisdiction *ratione domicilii* supports this observation. Under this head of jurisdiction,<sup>48</sup> which is to be

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<sup>46</sup> See generally Anton, *supra* n 43, 91-92.

<sup>47</sup> This aspect of the traditional Scottish jurisdiction rules are very similar to the system of jurisdiction under Regulation (EU) No. 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast) [2012] OJ L 351/1 (the “Brussels Ia Regulation”).

<sup>48</sup> See generally Duncan & Dykes, *supra* n 45, Ch 2 and AD Gibb, *The International Law of Jurisdiction in England and Scotland* (Edinburgh, William Hodge & Co, 1926), 42-47.

distinguished from that concerning the so-called “itinerants”,<sup>49</sup> “domicile” was defined as residence in Scotland for a minimum period of 40 days.<sup>50</sup> As noted by Duncan and Dykes, citing the decision in *Ritchie v Fraser*,<sup>51</sup> the defender’s presence in that 40-day period did not need to be uninterrupted.<sup>52</sup> Though the defender did not necessarily have to be resident in a house in Scotland, he had to be based “substantially in one locality”.<sup>53</sup> According to Duncan and Dykes, residence for a period shorter than forty days was also deemed to be sufficient to found jurisdiction *ratione domicilii*, provided that the defender entered the country *amino remanendi*.<sup>54</sup> In contrast, under the English common law rules, mere presence within the forum, however transient or impermanent, has always been sufficient to afford jurisdiction to the court. None of the additional requirements, which must be met to establish jurisdiction *ratione domicilii*, are needed under English law. In short, therefore, a much stronger degree of connection, than that required under the English rules, had to exist before the Scots court would assume jurisdiction based on the defender’s residence.

Similarly, and, indeed, more self-evidently,<sup>55</sup> strong connection was required between the cause of action and Scotland before the Scots court would entertain proceedings on the basis of jurisdiction *ratione rei gestæ*.<sup>56</sup> As indicated earlier, this head of jurisdiction would be founded if the cause of action in question had arisen in Scotland, while the defender was present therein.<sup>57</sup> For instance, in a delictual case, the Scots court would only assume jurisdiction over the defender *ratione rei gestæ* if the delict in question had occurred in Scotland and the defender was present in Scotland when the proceedings were initiated.

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<sup>49</sup> This head of jurisdiction allows the Scots court to assume jurisdiction over a defender who “has no fixed residence” and “has been personally cited within” Scotland: Anton, *supra* n 43, 105.

<sup>50</sup> Lord President Inglis in *Joel v Gill* (1859) 21 D 929, 939, as cited in Duncan & Dykes, *supra* n 45, 28.

<sup>51</sup> (1852) 15 D 205.

<sup>52</sup> Duncan & Dykes, *supra* n 45, 28.

<sup>53</sup> *Ibid*, 30, citing *Joel*, *supra* n 50.

<sup>54</sup> *Ibid*, 33.

<sup>55</sup> FCV Savigny, *A Treatise on the Conflict of Laws*, W Guthrie Translation, 2<sup>nd</sup> edn (New Jersey, Rothman Printers Inc, 1972), 197-221.

<sup>56</sup> See generally Duncan & Dykes, *supra* n 45, Ch 3, Gibb, *supra* n 48, 57-61 and Anton, *supra* n 43, 117-122.

<sup>57</sup> Duncan & Dykes, *supra* n 45, 42.



It follows, therefore, that the assumption of jurisdiction, whether *ratione domicilii* or *ratione rei gestæ*, depended on the existence of sufficient link between Scotland and the dispute and/or the defender involved in the case. Therefore, the conditions which might have fostered the development of a doctrine such as *forum non conveniens* – namely, a much more open-textured set of jurisdiction rules similar to those under English law – were absent. In these circumstances, it is highly improbable, it is argued, for a discretionary staying-of-proceedings practice, resembling the modern-day *forum non conveniens* doctrine, to have originated in Scotland prior to the eighteenth century.

#### **D. The origins of the Scottish *forum non conveniens* doctrine: an alternative explanation**

The foregoing analysis has sought to show that, contrary to the widely-held view within the relevant academic commentaries, the *forum non conveniens* doctrine cannot be *conceptually* traced to the *forum (non) competens* plea (as applied in the seventeenth and eighteenth centuries). Moreover, because of the nature of Scottish jurisdiction rules, it is very unlikely for the doctrine to have originated before the eighteenth century. If these contentions are accepted, then the possible starting point for the Scots *forum non conveniens* doctrine would remain obscure. The purpose of this part of the discussion is to take steps towards clarifying this aspect of the Scottish conflict-of-laws rules.

One potentially fruitful line of enquiry, in this regard, is to examine the evolution of the rules of jurisdiction in Scotland from the eighteenth century onwards. This assessment would highlight the changes which helped to bring about the conditions for the cultivation of a discretionary staying-of-proceedings practice in Scotland. From studying the accounts in some of the leading textbooks in the field, it is discernible that it was not until the eighteenth century when the Scottish jurisdiction rules began to become more exorbitant. In this respect, perhaps the most significant development in Scots law was the introduction of a ground of

jurisdiction based on arrestment of moveable property situated within Scotland.<sup>58</sup> The assumption of jurisdiction through this process has been referred to within the case law and academic commentary as *jurisdictionis fundandæ causa* or arrestment *ad fundandam jurisdictionem*. This rule of jurisdiction is regarded as having been borrowed from the Dutch law.<sup>59</sup> Anton has claimed that it was towards the end of the seventeenth century, in *Young v Arnold*,<sup>60</sup> when the Scottish court, for the first time, entertained jurisdiction under this head.<sup>61</sup> Nevertheless, it appears that it was really in the mid-eighteenth century when this head of jurisdiction was routinely resorted to as a basis for founding cross-border private-law disputes in Scotland.<sup>62</sup>

An even cursory analysis of the features of the arrestment-of-movables jurisdiction in Scotland is sufficient to illustrate its exorbitance. This head of jurisdiction empowered the Scottish court to entertain a claim against a defender, irrespective of his presence in Scotland, on the basis of the arrestment of his moveable property within the forum. What is more, there was no need for the value of the arrested properties to correspond to what the pursuer was claiming.<sup>63</sup> Finally, and similar to the position in common law admiralty cases,

“the property arrested need not have [had] any connection with the action: for example, a ship belonging to the defenders may be arrested to found jurisdiction against them in an action for damages arising out of a collision involving another of the defenders’ ships”.<sup>64</sup>

In these circumstances, it is not hard to see that the arrestment-of-movables jurisdiction was much more likely to lead to the undesirable situation of the Scottish court entertaining

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<sup>58</sup> See generally Duncan & Dykes, *supra* n 45, Ch 4, Gibb, *supra* n 48, 61-79 and Anton, *supra* n 43, 106-114.

<sup>59</sup> Duncan & Dykes, *supra* n 45, 72, Gibb, *supra* n 48, 62 and Anton, *supra* n 43, 106. The Dutch referred to it as *forum arresti*.

<sup>60</sup> (1683) M 4833.

<sup>61</sup> Anton, *supra* n 43, 106.

<sup>62</sup> Gibb, *supra* n 48, 62.

<sup>63</sup> Anton, *supra* n 43, 108, citing *Shaw v Dow and Dobie* (1869) 7 M 449.

<sup>64</sup> *Ibid* (citation omitted).

disputes with little (or no) connection with Scotland. Such a jurisdiction rule, it is argued, was of the kind which had a more pressing need for a principle such as *forum non conveniens* to counter its problematic effects.

Nevertheless, there are no reported cases in Scotland, in the eighteenth century, in which the Scottish court ever mentioned the existence of a discretionary power to relinquish its otherwise properly-founded jurisdiction. This state of affairs is, in part, explicable by the fact that, for some time after its introduction into Scots law, the Scottish court had ascribed a fairly narrow scope to its arrestment-of-movables jurisdiction.<sup>65</sup> Consequently, there had not been many instances in which the exorbitance of this head of jurisdiction had become so evident as to require the court to respond by developing a measure like the modern-day *forum non conveniens* doctrine. Furthermore, the fact that the Dutch law,<sup>66</sup> where the Scots are said to have borrowed the idea of arrestment of moveable assets as the basis for assuming *in personam* jurisdiction, did not contain a mechanism for discretionary non-exercise of jurisdiction could explain the Scottish court's inaction in introducing a discretionary staying-of-proceedings practice into Scots law in the eighteenth century.

From the mid-eighteenth century onwards, however, there was an increase in the number of cases in which the Scottish court assumed jurisdiction on the basis of the arrestment of moveable chattels in Scotland.<sup>67</sup> It is possible to extrapolate from this development that, by the early nineteenth century, it had become commonplace for proceedings with little (or even no) connection with Scotland to have been initiated before the Scots court. It is argued that the gradual prevalence of this exorbitant element within the

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<sup>65</sup> See Nuyts, *supra* n 36, 94.

<sup>66</sup> Indeed, one Dutch commentator has suggested that it would be a welcome development if the Dutch court entertained applications for staying of its proceedings in cases where the arrestment of a defendant's assets in the Netherlands is the basis for the court's assumption of jurisdiction: LThLG Pellis *Forum Arresti: aspecten van rechtsmachtscheppend (vreemdelingen-)beslag in Europa*, (Zwolle, WEJ Tjeenk Willink, 1993), 127. It is, therefore, argued that courts in the Netherlands had not envisaged a notion concerned with staying of proceedings where the court's jurisdiction had been assumed exorbitantly.

<sup>67</sup> Gibb, *supra* n 48, 62.

Scottish system of jurisdiction rules, and the resulting problem of jurisdiction being assumed over disputes unconnected with Scotland, combined to trigger the need for the emergence of the practice which underpins today's *forum non conveniens* doctrine. It was, therefore, in this context that the Scots court began to develop a response – which took the form of a discretionary element in exercising its jurisdiction – to the inherent harshness of the rule under which jurisdiction was assumed by means of arresting the defender's moveable property in Scotland.<sup>68</sup>

Having narrowed down the search for the earlier origins of *forum non conveniens* to the early nineteenth century, the question remains as to the significant force(s) which contributed to its emergence in its embryonic form. In this regard, Professor Nuyts has pointed to *Hawkins v Wedderburn*,<sup>69</sup> an 1842 Court of Session ruling, as an important milestone in the development of the *forum non conveniens* doctrine.<sup>70</sup> It is, thus, apposite at this stage to examine if the decision in *Hawkins* did, indeed, mark the starting point in the evolution of what is now regarded as the *forum non conveniens* doctrine.

## 1. *Hawkins v Wedderburn*

In this case, H (and others) commenced proceedings in England in respect of a debt, which they alleged was owed to them from W (and others). The defenders were English domiciliaries with estates in Scotland. While the English proceedings were ongoing, H initiated another set of proceedings against W in Scotland. The Scottish action was concerned with “diligence”.<sup>71</sup> In response, W sought for the Scottish action to be dismissed based, *inter*

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<sup>68</sup> See similarly Nuyts, *supra* n 36, 94-95.

<sup>69</sup> (1842) 4 D 924.

<sup>70</sup> Nuyts, *supra* n 36, 95. The original text, which is in French, states: “*L’année 1842 marque une date importante dans la construction de la doctrine forum non conveniens et des relations que cette doctrine entretient avec l’exception de litispendance*”.

<sup>71</sup> Broadly speaking, diligence includes various forms of legal processes taken by creditors to enforce repayment of overdue debts. It could include a creditor seeking a security-like order over a defender's assets in Scotland so as to pre-empt its possible dissipation.

*alia*, on the plea of *lis alibi pendens* – namely, that the Scottish action concerned the same cause of action (and was between the same litigants) as the one pending in England.<sup>72</sup> One of the questions which the Scots court had to contend with was “whether the action was competent in the Court of Session, or must be dismissed on the ground of *lis alibi pendens*, in respect of the proceedings adopted in [England]?”<sup>73</sup> In a majority ruling,<sup>74</sup> the Court of Session stated that the Scottish action had been commenced in order to obtain security for the debt under dispute and, thus, did not concern the issues which were raised in the English proceedings. Accordingly, it held that the English action did not bar the proceedings in Scotland. Nevertheless, and in the course of their opening remarks, the majority stated that

“there seems to be no doubt, that in cases of *lis alibi pendens*, even in a foreign court, it is competent for the Court in this country to consider the effect of that circumstance, and if it be such as in reason and equity to require the dismissal, or the sisting, or modification of the action raised here, to give it such effect.”<sup>75</sup>

Professor Nuyts has referred to this passage in contending that *Hawkins* was “the first case which explicitly recognised that the court *may exercise its discretion* not to litigate a case even though it has a clear jurisdiction over it”.<sup>76</sup>

Be that as it may, for two main reasons, Professor Nuyts’s view on the significance of the decision in *Hawkins* in the evolution of the *forum non conveniens* doctrine is open to question. First, and strictly speaking, *Hawkins* did not concern a *lis alibi pendens* situation.

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<sup>72</sup> *Hawkins*, *supra* n 69, 927.

<sup>73</sup> *Ibid*, 929.

<sup>74</sup> Lord Mackenzie, Lord Fullerton, Lord Cockburn, Lord Cunninghame, Lord Murray and Lord Ivory; Lord President Boyle, Lord Gillies and Lord Medwyn dissenting. The basis for the dissenting judges’ disagreement with the majority judges was that, in their view, the pursuers should not have been able to resort to diligence in the first place.

<sup>75</sup> *Hawkins*, *supra* n 69, 939.

<sup>76</sup> Nuyts, *supra* n 36, 96 (emphasis added). The French text states: “[o]n trouve dans cette jurisprudence la première reconnaissance explicite de l’existence d’un pouvoir discrétionnaire de ne pas poursuivre l’examen d’une cause à l’égard de laquelle le juge dispose d’une compétence établie”.

The initial action in England had arisen in relation to the pursuers' ability to recover a debt, which they alleged to have been due to them. The Scottish action, though, was one in which the pursuers had stated explicitly that they were not concerned with the merits of the English action.<sup>77</sup> By contrast, the proceedings in Scotland had been brought to secure the defenders' assets in order subsequently to enforce the (eventual) English judgment. To this extent, the point raised in the passage quoted above, however interesting it may be, was a side-issue. It is difficult to regard the statement as laying down a proposition of law, especially given that the case did not, in fact, involve parallel proceedings (in England and Scotland) of identical actions involving similar parties.

The second reason for questioning the importance of the decision in *Hawkins*, in the developments which led to the emergence of the *forum non conveniens* doctrine in Scotland, is that there is scarcely any reference to the case in the leading authorities, in the second half of the nineteenth century, in which the Scottish discretionary staying-of-proceedings practice began to take form (and gain prominence). Moreover, the decision in *Hawkins* does not appear in the account, in the leading conflict-of-laws textbooks in Scotland, on the origins and development of the Scots *forum non conveniens* doctrine. Indeed, in the first edition of *Private International Law* in 1967, Anton referred to *Hawkins* in a footnote, as an authority for the proposition that the Scottish court may temporarily stay its proceedings "to preserve arrestments on the dependence and secure a fund to answer to the foreign court's decree, if and when obtained".<sup>78</sup> For these reasons, the ruling in *Hawkins v Wedderburn* should not be regarded as having had a direct influence in the Scots court's introduction of the practice of discretionary staying of proceedings – which has come to be defined under the *forum non conveniens* doctrine.

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<sup>77</sup> *Hawkins*, *supra* n 69, 928-929.

<sup>78</sup> Anton, *supra* n 43, 154.

## ***2. Misunderstanding of earlier case law and the emergence of the discretionary staying-of-proceedings practice in Scotland in the 1840s***

Instead, it is argued that it is much more plausible to regard the Court of Session's ruling in another 1840s case as the starting-point for the practice of discretionary staying of proceedings in Scotland: *M'Morine v Cowie*.<sup>79</sup> Decided in 1845, *M'Morine* is the first reported case in which judges and counsel acknowledged that the defender was able to invite the court to give up its soundly-established jurisdiction in favour of the "proper forum". Furthermore, *M'Morine* appears to be the first case in which the Scots court employed the phrase *forum competens* in respect of the *exercise* (rather than the *existence*) of jurisdiction.<sup>80</sup>

*M'Morine* concerned a will which had been executed in India. Under the will, the testator had left a substantial proportion of his property to the pursuers and had appointed the defender (and others) as the will's executors. Not long thereafter, the pursuers commenced proceedings against the defender, by means of arresting his moveable assets in Scotland, and sought to recover the sum which they claimed had been due to them under the will. In response, the defender argued that the case in question related to the administration of a foreign estate and, thus, the "arrestment did not found jurisdiction against" him.<sup>81</sup> In response, the pursuers claimed, *inter alia*, that the arrestment of the defender's moveable property in Scotland had given the Scots court "undoubted" jurisdiction over the dispute. However, by stating that "it was open to the defender upon the merits to satisfy the Court that [the Scots court] was not the proper *forum* for accounting",<sup>82</sup> the pursuers suggested that the defender was able to try and convince the court to give up its jurisdiction in favour of the place where the foreign estate was based.

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<sup>79</sup> (1845) 7 D 270.

<sup>80</sup> Nuyts, *supra* n 36, 97.

<sup>81</sup> *M'Morine*, *supra* n 79, 270.

<sup>82</sup> *Ibid*, 272.

Though not directly stated, there were clear intimations in the Court of Session's short ruling that the Scots court had a discretion in relation to the exercise of its jurisdiction. For instance, Lord Jeffery observed that "the question [in the case before the court was] not one of jurisdiction, but of *forum competens*[:] ... which is the proper *forum* for accounting?"<sup>83</sup> Similarly, Lord Fullerton noted that "it cannot be said that we have no jurisdiction, though, when we examine the case, we may say that this is not the proper *forum* for accounting [ie, determining the parties' dispute]".<sup>84</sup> As the defender had not challenged the court's *exercise* of jurisdiction, the court made no pronouncement on that matter. The defender's no-jurisdiction plea was, thus, repelled.

Just over a year after its ruling in the *M'Morine* case, in *Tulloch v Williams*,<sup>85</sup> the same judges reiterated the Scottish court's ability to relinquish its jurisdiction, on a discretionary basis, in favour of a proper forum elsewhere. In *Tulloch*, T, was a resident of Edinburgh. He had employed W, a Jamaican citizen, to manage his estate in Jamaica. T commenced proceedings against W, while he was visiting Scotland, seeking, *inter alia*, damages from W for alleged mismanagement and neglect of duty in the running of the estate. In response, while acknowledging that the Scottish court had jurisdiction over him,<sup>86</sup> W invited the court to stay its proceedings, stating that all the documents and witnesses relevant to the claim were in Jamaica.<sup>87</sup> Yet again, in a short ruling, the Court of Session stated that, while it had jurisdiction to entertain the case, it was an "inconvenient" forum for it.<sup>88</sup> On the

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<sup>83</sup> *Ibid.*

<sup>84</sup> *Ibid.*

<sup>85</sup> (1846) 8 D 657.

<sup>86</sup> This acknowledgement appears to have come at a later stage in the proceedings as W had initially questioned the Scots court's jurisdiction.

<sup>87</sup> *Tulloch*, *supra* n 85, 658.

<sup>88</sup> *Ibid*, 659 (especially Lord Fullerton Lord President and Mackenzie).



facts of the case, the court ordered for the Scottish proceedings to be stayed for three months, to allow T to bring proceedings in Jamaica.<sup>89</sup>

The manner in which judges and counsel, in *M'Morine* and *Tulloch*,<sup>90</sup> discussed the Scots court's power to relinquish its otherwise properly-constituted jurisdiction on a discretionary basis may be reasonably regarded as rather curious. After all, it gave the impression that the practice of discretionary non-exercise of jurisdiction had been a long-standing feature of Scottish conflict-of-laws rules.<sup>91</sup> At face value, this state of affairs might be explicable in view of the fact that, in the *M'Morine* case, two important earlier Court of Session rulings regarding the administration of foreign trusts and estates were referred to in the course of the counsel's submissions (and judges' reasoning): *Brown's Trustees v Palmer*<sup>92</sup> and *Macmaster v Macmaster*.<sup>93</sup> These authorities appear to have been cited as evidence of the Scots court's ability to stay its proceedings on a discretionary basis. For instance, in *M'Morine*, while seeking to persuade the court that the case before it was one concerning the *exercise* (as opposed to the *existence*) of jurisdiction, the pursuers' counsel had stated that "in the case of *Macmaster* the action was dismissed, not because it was incompetent, but because the more proper *forum* was elsewhere".<sup>94</sup> Indeed, in the first edition of *Private International Law*, Anton has suggested that the decision in *Macmaster* (and also in *Brown's Trustees*) were instances of the Scottish court relying on its discretion in deciding whether to exercise jurisdiction – and would now be regarded as *forum non conveniens* cases.<sup>95</sup>

Nevertheless, it is argued that this is not a particularly convincing reading of the decisions in *Brown's Trustees* and *Macmaster*. Consider, first of all, the judgment in *Brown's*

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<sup>89</sup> *Ibid.*

<sup>90</sup> See also *Parken v Royal Exchange Assurance Co* (1846) 8 D 365.

<sup>91</sup> See also Nuyts, *supra* n 36, 97.

<sup>92</sup> (1830) 9 S 224.

<sup>93</sup> (1833) 11 S 685.

<sup>94</sup> *M'Morine*, *supra* n 69, 272.

<sup>95</sup> Anton, *supra* n 43, 472-473.

*Trustees*. Decided in 1830, the case had concerned an action initiated by the beneficiaries of a will against its executor. Under the will, the defender had been appointed to administer the testator's estate in India. After arresting his moveable assets in Scotland, the pursuers commenced proceedings against the defender. Put simply, in those proceedings the pursuers complained about the defender's management of the estate. In response, the defender challenged the Scots court's jurisdiction. In particular, he submitted that

“to the effect that being an executor in India, where the duties of the office were to be fulfilled, and being still resident there, and subject to the jurisdiction of the Courts in that country, *arrestment could not establish a jurisdiction in this Court* to call him to account here for the execution of his office.”<sup>96</sup>

On the facts of the case, the court held that the arrestment-of-movables jurisdiction was “not a sufficient authority for this Court calling upon the defender to account for his intromissions as executor”.<sup>97</sup> As such, the court dismissed the pursuers' claim.

Three years later, in the *Macmaster* case, the Scots court adopted a similar approach. In this case, the pursuers had brought proceedings against the defenders, following the arrestment of their Scotland-based moveable properties, in order to obtain their share of a succession outside Scotland. In turn, the defenders argued that any proceedings against them had to be brought in New Brunswick, where the estates were to be administered. In a brief judgment, Lord Justice-Clerk Boyle admitted the defenders' contention that the executors of a foreign will, if not present in Scotland,<sup>98</sup> were not to be accountable in Scotland for issues relating to that will.<sup>99</sup>

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<sup>96</sup> *Brown's Trustees*, *supra* n 92, 224 (emphasis added).

<sup>97</sup> *Ibid*, 224-225.

<sup>98</sup> The fact that the Scottish court had stated that it had jurisdiction to hear a case concerning the administration of foreign wills or trusts, that had been brought against an executor who was present in Scotland at the time of the suit's initiation, is evidenced in *Peters v Martin* (1825) 4 S 107.

<sup>99</sup> *Macmaster*, *supra* n 93, 688 (Lord Glenlee, Lord Meadowbank and Lord Cringletie concurring).

While the interpretation of these cases is certainly not helped by the rather old-fashioned and (at times) vague language used in the judgments, it is nevertheless contended that cases like *Brown's Trustees* or *Macmaster* were not concerned with the discretionary staying of proceedings. The Scottish court's finding in those cases was that, although jurisdiction was normally founded upon arrestment of the defender's assets in Scotland, in cases involving the administration of foreign trusts or wills, the Scottish court ought not to entertain the dispute. Those cases were, in other words, exceptions to the general rule which allowed for jurisdiction to be assumed on the basis of arresting movable chattels in Scotland. It is argued that the exceptional nature of the decision in cases like *Brown's Trustees* and *Macmaster* may well have been misunderstood (or overlooked) by the counsel and judges in *M'Morine*. In short, therefore, *Brown's Trustees* and *Macmaster* were not discretionary staying-of-proceedings cases.

It is perhaps ironic that an apparent misunderstanding of *Brown's Trustees* and *Macmaster* has played such a central role in the emergence of the practice of discretionary staying of proceedings – similar to what is now characterised under the label *forum non conveniens*. But, in any event, it is indeed highly likely that, by giving the impression that the practice had deep roots in Scottish conflict of laws, this misunderstanding helped to hasten the development of the practice from its embryonic form to that which resembled a fairly well-established measure that was employed by the Court of Session in decisions like *Longworth* and *Clements* in the 1860s.

## **E. Conclusion**

Throughout the common law world, conflict-of-laws scholars and practitioners are well aware of the importance of Scottish law's role in the development of the *forum non conveniens* doctrine in their respective jurisdictions. Incontrovertibly, the doctrine was first

applied in Scotland. Moreover, Scottish *forum non conveniens* has had a clear influence – whether directly or otherwise – in the development of the discretionary staying-of-proceedings practices across much of the common law world. However, what is less well-understood is the earlier origins of the doctrine in its birthplace. In particular, it is far from clear how the Scottish court had arrived at the position it had in cases like *Longworth* and *Clements* in the 1860s, which were so significant in the refinement of the practice at the heart of *forum non conveniens* in Scotland. This article has endeavoured to fill this gap in our knowledge of the Scottish doctrine. In this context, its chief objective has been to identify and develop an explanation of the more-distant origins of the Scottish *forum non conveniens* doctrine.

The foregoing discussion has sought to illustrate that, contrary to the view advanced by a number of academic commentators, the Scottish *forum non conveniens* doctrine is not the *conceptual* descendant of the earlier *forum non competens* plea. Instead, any connection between the two was merely *linguistic*. Furthermore, largely due to the nature of the Scottish jurisdiction rules prior to the eighteenth century, it seems highly unlikely for a discretionary staying-of-proceedings practice, resembling the modern-day *forum non conveniens* doctrine, to have originated in Scotland in that era.

Instead, it is argued that the conditions for the cultivation of a discretionary staying-of-proceedings practice in Scotland were indeed in place towards the middle of the eighteenth century, after the Scots court's jurisdiction rules had become much more exorbitant in nature. The resulting (if piecemeal) increase in the number of instances in which the Scottish court assumed jurisdiction over disputes with little (or no) connection with Scotland in the nineteenth century is likely to have prompted the need for the introduction of the practice which underpins today's *forum non conveniens* doctrine. It is contended that it was in this context, in the case of *M'Morine v Cowie* in 1845, in which, following a misinterpretation of

earlier case law concerning the administration of foreign estates and partnerships, the discretionary staying-of-proceedings practice first manifested itself in Scotland.